

AMENDED IN SENATE MARCH 27, 2003

SENATE BILL

No. 418

Introduced by Senator Sher

February 20, 2003

~~An act to repeal Section 2100 of the Fish and Game Code, relating to candidate, threatened, and endangered species. An act to repeal and add Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code, relating to fish and wildlife, and making an appropriation therefor.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 418, as amended, Sher. ~~Candidate, threatened, and endangered species~~ *Fish and wildlife: streambed alteration agreements.*

(1) *Existing law requires a governmental agency or public utility that proposes a project that would divert, obstruct, or change the natural flow of, or result in the disposal of debris in, a river, stream, or lake designated by the Department of Fish and Game, to submit prescribed plans and other information to the department, and to follow prescribed procedures. Under existing law, a violation of the Fish and Game Code is a crime.*

This bill would revise that proposal process by doing all of the following:

- (a) Define various terms.*
- (b) Clarify the notification and determination procedure, including prescribing deadlines throughout the process and making it uniform as to all applicants.*
- (c) Modify the existing arbitration process, including requiring that one arbitration panel member have relevant scientific expertise.*

(d) Remove the cap on the amount of fees that may be charged for administering and enforcing the process.

(e) Require that a holder of an agreement to alter a streambed remain responsible for implementing any mitigation or other measures necessary to protect fish and wildlife resources after the agreement has expired.

(f) Authorize the department to issue lake or streambed alteration agreements for longer than 5 years under certain circumstances.

(g) Authorize the department to suspend or revoke an agreement if the agreement holder is not in compliance with the terms of the agreement.

To the extent this bill would provide for additional criminal prosecutions for violations of the bill, it would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(3) Existing law continuously appropriates money in the Fish and Game Preservation Fund to the department to pay all necessary expenses incurred in carrying out the Fish and Game Code. Unless otherwise provided, all money collected under the code is deposited in the fund.

By imposing new duties on the department, and potentially increasing revenues deposited in the fund, the bill would make an appropriation.

~~Prior law required a commission to be established by July 1, 1997, to study the economic impact of protecting candidate, threatened, and endangered species under the California Endangered Species Act. That law was repealed October 12, 2001. Existing law contains provisions relative to that commission.~~

~~This bill would repeal those provisions.~~

Vote: majority. Appropriation: ~~no~~ yes. Fiscal committee: ~~no~~ yes. State-mandated local program: ~~no~~ yes.

The people of the State of California do enact as follows:

~~SECTION 1. Section 2100 of the Fish and Game Code is repealed.~~

SECTION 1. Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code is repealed.

SEC. 2. Chapter 6 (commencing with Section 1600) of Division 2 is added to the Fish and Game Code, to read:

CHAPTER 6. FISH AND WILDLIFE PROTECTION AND CONSERVATION

1600. The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state. This chapter is enacted to provide conservation for these resources.

1601. The following definitions apply to this chapter:

(a) "Agreement" means a lake or streambed alteration agreement.

(b) "Day" means business day.

(c) "Emergency" has the same definition as in Section 21060.3 of the Public Resources Code.

(d) "Entity" means any person, state or local governmental agency, or public utility that is subject to this chapter.

1602. (a) It is unlawful for any entity to substantially divert or obstruct the natural flow of, or substantially change or use any material from, the bed, channel, or bank of any river, stream, or lake designated by the department, unless all of the following occur:

(1) The department receives written notification regarding the activity, in the manner prescribed by the department.

(2) The department determines the notification is complete.

(3) The entity pays the applicable fees, pursuant to Section 1609.

(4) One of the following occurs:

(A) The department determines that the activity will not substantially adversely affect an existing fish or wildlife resource,

1 and informs the entity that it may commence the activity without
2 an agreement, as long as the entity conducts only the activity
3 described in the notification and incorporates into the activity any
4 measures intended to protect fish and wildlife resources.

5 (B) The department issues a final agreement to the entity that
6 includes measures necessary to protect any fish and wildlife
7 resources that the activity might substantially adversely affect, and
8 the entity conducts the activity in accordance with the agreement.

9 (C) A panel of arbitrators issues a final agreement to the entity
10 in accordance with subdivision (b) of Section 1603, and the entity
11 conducts the activity in accordance with the agreement.

12 (D) The department does not issue a draft agreement to the
13 entity within 60 days from the date the department deems the
14 notification to be complete, and the entity conducts the activity in
15 accordance with the notification, including taking measures that
16 are necessary to protect fish and wildlife resources.

17 (b) (1) Except as otherwise provided in this subdivision, the
18 term of an agreement shall not exceed five years. However, the
19 entity shall remain responsible for implementing any mitigation or
20 other measures necessary to protect fish and wildlife resources
21 after the agreement expires. Any agreement executed pursuant to
22 this chapter shall specify the term of the agreement. The
23 department shall extend an agreement for a one-year period at the
24 expiration of its term if the entity requests the department to extend
25 the agreement, in writing, at least 30 days prior the expiration date
26 of the agreement, and pays the applicable fee. The department
27 shall extend the agreement without modification unless the
28 department determines the agreement is required to be modified to
29 protect fish and wildlife resources. If the entity submits a request
30 to renew the agreement, the agreement shall remain in effect until
31 the department notifies the entity of its decision to grant or deny
32 the request. If there is a disagreement between the department and
33 the entity as to whether the agreement needs to be modified to
34 protect fish and wildlife resources, the department and the entity
35 shall attempt to resolve any disagreement in accordance with
36 Section 1603.

37 (2) Notwithstanding paragraph (1), if a permit or a
38 memorandum of understanding has been issued pursuant to
39 Chapter 1.5 (commencing with Section 2050) of Division 3, or a
40 natural community conservation plan has been approved pursuant

1 to Chapter 10 (commencing with Section 2800) of Division 3, or
2 any other state or federal regulatory program has been approved
3 that comprehensively addresses the fish and wildlife resources
4 protected by this chapter, and the department determines, in
5 writing, that the measures contained in the permit, memorandum
6 of understanding, plan, or program are adequate to protect fish
7 and wildlife resources, the department may issue an agreement
8 with a term longer than five years. The term of the agreement may
9 not exceed the term of the other permit, memorandum of
10 understanding, plan, or program. The agreement shall be subject
11 to any provisions in the permit, memorandum of understanding,
12 plan, or program governing the extension of, or amendment to, the
13 permit, memorandum of understanding, plan, or program.

14 (c) If an activity involves the routine maintenance and
15 operation of water supply, drainage, flood control, or waste
16 treatment and disposal facilities, notice to and agreement with the
17 department shall not be required after the initial notification and
18 agreement, unless the department determines any one of the
19 following:

20 (1) The work described in the agreement has substantially
21 changed.

22 (2) Conditions affecting fish and wildlife resources have
23 substantially changed, and those resources are adversely affected
24 by the activity conducted under the agreement.

25 (3) The agreement otherwise needs to be modified to protect
26 fish and wildlife resources.

27 The department shall be provided with a copy of the agreement
28 in order to make this determination. This subdivision applies to
29 any instance where notice to, and agreement with, the department
30 was attained prior to January 1, 1977.

31 (d) State and local governmental agencies, public utilities and
32 their employees, agents, contractors acting within the scope of
33 their employment, agency or contract, shall not be subject to
34 criminal liability for violating this section, but may be liable under
35 Section 1604.

36 (e) The department shall not condition the issuance of an
37 agreement on the receipt of another local, state, or federal permit.

38 (f) Any time period prescribed in this chapter may be extended
39 by mutual agreement.

1 1603. (a) After the department determines that the
2 notification is complete and that an agreement is required, the
3 department shall provide a draft agreement to the entity within 60
4 days. Within 30 days of the date of receipt of the draft agreement,
5 the entity shall notify the department whether the measures to
6 protect fish and wildlife resources in that draft agreement are
7 acceptable. If the department's measures are not acceptable, the
8 entity shall so notify the department in writing and specify the
9 measures that are not acceptable. Upon written request, the
10 department shall meet with the entity within 14 days of the date the
11 department receives that notice for the purpose of resolving any
12 disagreement regarding those measures. If the entity fails to
13 respond in writing within 90 days of receiving the draft agreement,
14 the department may withdraw that agreement, and require the
15 affected entity to resubmit a notification to the department before
16 commencing the activity.

17 (b) If mutual agreement is not reached at any meeting held
18 pursuant to subdivision (a), the entity may request, in writing, the
19 appointment of a panel of arbitrators to resolve the disagreement.
20 A panel of arbitrators shall be appointed within 14 days of receipt
21 of the written request. The panel of arbitrators shall be comprised
22 of three persons, as follows: one representative selected by the
23 department; one representative selected by the affected entity; and
24 a third person mutually agreed upon by the department and the
25 entity, who shall serve as the panel chair. If the department and the
26 entity cannot agree on the third person within that 14-day period,
27 the third person shall be appointed in the manner provided by
28 Section 1281.6 of the Code of Civil Procedure. The third person
29 shall have scientific expertise relevant to the fish and wildlife
30 resources that have been identified as being potentially adversely
31 affected by the activity proposed by the entity. The authority of the
32 panel of arbitrators is limited to resolving disagreements
33 regarding the measures specified in subparagraph (B) of
34 paragraph (3) of subdivision (a) of Section 1602. Any measures
35 approved by the panel shall protect fish and wildlife resources. Any
36 decision by the panel of arbitrators shall be binding on the
37 department and the affected entity, shall be based on the best
38 scientific information reasonably available at the time of the
39 arbitration, and shall be made in the form of a final agreement. The
40 final agreement issued by the panel shall also include, without



1 *modification, all measures that were not subject to arbitration.*
2 *Each party shall pay the expenses of their selected representative*
3 *and pay one-half the expenses of the third person.*

4 1604. (a) *Any entity that violates this chapter is subject to a*
5 *civil penalty of not more than twenty-five thousand dollars*
6 *(\$25,000) for each violation.*

7 (b) *The civil penalty imposed pursuant to subdivision (a) is*
8 *separate, and in addition to, any other civil penalty imposed*
9 *pursuant to this section or any other provision of law.*

10 (c) *In determining the amount of a civil penalty imposed*
11 *pursuant to this section, the court shall take into consideration the*
12 *nature, circumstance, extent, and gravity of the violation. In*
13 *making this determination, the court may consider the degree of*
14 *toxicity and volume of the discharge, whether the effects of the*
15 *violation may be reversed or mitigated, the entity's ability to pay,*
16 *the effect of the penalty on the ability of the entity to continue in*
17 *business, any voluntary cleanup efforts undertaken by the entity,*
18 *any prior history of violations by the entity, the gravity of the*
19 *entity's behavior, the economic benefit to the entity, if any, resulting*
20 *from the violation, and any other matters the court determines*
21 *justice may require.*

22 (d) *A civil action brought under this section shall be brought by*
23 *the Attorney General upon complaint by the department, or by the*
24 *district attorney or city attorney in the name of the people of the*
25 *State of California. Any actions relating to the same violation may*
26 *be joined or consolidated.*

27 (e) *If the relief sought in an action brought pursuant to this*
28 *section is a temporary restraining order, preliminary injunction, or*
29 *permanent injunction, it is not necessary to allege or prove at any*
30 *stage of the proceeding any of the following:*

31 (1) *That irreparable damage will occur if the temporary*
32 *restraining order, preliminary injunction, or permanent injunction*
33 *is not issued.*

34 (2) *The remedy at law is inadequate. The court shall issue a*
35 *temporary restraining order, preliminary injunction, or permanent*
36 *injunction in a civil action brought pursuant to this chapter*
37 *without the allegations and without the proof specified in this*
38 *paragraph or paragraph (1).*

1 (f) Civil penalties collected pursuant to this section shall not be
2 considered fines or forfeitures as defined in Section 13003, and
3 shall be apportioned in the following manner:

4 (1) Fifty percent to the county treasurer of the county in which
5 the action is prosecuted. Amounts paid to the county treasurer shall
6 be deposited in the county fish and wildlife propagation fund
7 established pursuant to Section 13100.

8 (2) Fifty percent to the department for deposit in the Fish and
9 Game Preservation Fund. These funds may be expended to cover
10 the costs of any legal action or for any other law enforcement
11 purpose consistent with Section 9 of Article XVI of the California
12 Constitution.

13 1605. The department shall provide any entity that submits a
14 notification pursuant to Section 1602 are of the following
15 information:

16 (a) The time period for review of the notification.

17 (b) An explanation of the entity's right to object to any measures
18 proposed by the department.

19 (c) The time period within which objections may be made in
20 writing to the department.

21 (d) The time period within which the department is required to
22 respond, in writing, to the entity's objections.

23 (e) An explanation of the right of the entity to arbitrate any
24 measures in a draft agreement.

25 (f) The procedures and statutory timelines for arbitration,
26 including, but not limited to, information about the payment
27 requirements for arbitrator fees.

28 (g) The current schedule of fees to obtain an agreement.

29 1606. Any party affected by a decision made by an arbitration
30 panel pursuant to this chapter may petition a court of competent
31 jurisdiction for confirmation, correction, or vacation of the
32 decision in accordance with Chapter 4 (commencing with Section
33 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

34 1607. (a) Except as provided in subdivision (b), this chapter
35 does not apply to any of the following:

36 (1) Immediate emergency work necessary to protect life or
37 property.

38 (2) Immediate emergency repairs to public service facilities
39 necessary to maintain service as a result of a disaster in an area
40 in which a state of emergency has been proclaimed by the

Governor pursuant to Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code.

(3) Emergency projects undertaken, carried out, or approved by a state or local governmental agency to maintain, repair, or restore an existing highway, as defined in Section 360 of the Vehicle Code. This paragraph does not include a highway designated as an official state scenic highway pursuant to Section 262 of the Streets and Highways Code, within the existing right-of-way of the highway, that has been damaged as a result of fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, in the year prior to the application. Work needed in the vicinity above and below a highway may be conducted outside of the existing right-of-way if it is needed to stop ongoing or recurring mudslides, landslides, or erosion that pose an immediate threat to the highway, or to restore those roadways damaged by mudslides, landslides, or erosion to their predamage condition and functionality. This paragraph does not exempt from this section any project undertaken, carried out, or approved by a state or local governmental agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.

(b) The entity performing the emergency work described in subdivision (a) shall notify the department of the work, in writing, within 14 days of beginning the work. Any work described in the emergency notification that does not meet the criteria for the emergency work described in subdivision (a) is a violation of this chapter if the entity did not first notify the department in accordance with Section 1602.

1608. (a) An entity that submits a timber harvesting plan in accordance with Section 4581 of the Public Resources Code is deemed to have given the notification required by Section 1602, as long as the following information is included in the plan:

(1) The volume, type, and equipment to be used in removing or displacing any one or combination of soil, sand, gravel, or boulders.

(2) The volume of water, intended use, and equipment to be used in any water diversion or impoundment, if applicable.

(3) The equipment to be used in road or bridge construction.

(4) The type and density of vegetation to be affected and an estimate of the area involved.

1 (5) A diagram or sketch of the location of the operation that
2 clearly indicates the stream or other water and access from a
3 named public road. Locked gates shall be indicated and the
4 compass direction shall be shown.

5 (6) A description of the period of time in which operations will
6 be carried out.

7 (b) Notwithstanding subdivision (a), the department is not
8 required to process the notification until the timber harvesting plan
9 and the proper notification fee are submitted to the department.

10 1609. The director may establish a schedule of fees to be
11 charged to any entity subject to this chapter. The fees charged shall
12 be established in an amount necessary to pay the total costs
13 incurred by the department in administering and enforcing this
14 chapter, including, but not limited to, preparing and submitting
15 agreements and conducting inspections. The department may
16 adjust the fees pursuant to Section 713. Fees received pursuant to
17 this section shall be deposited in the Fish and Game Preservation
18 Fund.

19 1610. The department may suspend or revoke an agreement at
20 any time if it determines that an entity is not in compliance with the
21 terms of the agreement.

22 1611. This chapter does not require the department to issue an
23 agreement if it has notified an entity, in writing, that the activity in
24 which it is engaged violates any other provision of state or federal
25 law. Upon receipt of that notification by the entity, the timelines
26 provided in Section 1602 do not apply, until the violation has been
27 remedied.

28 1612. If an entity is required to comply with this chapter
29 pursuant to a court or administrative order following some form
30 of enforcement action, the entity shall include the measures
31 proposed by the department to protect fish and wildlife resources
32 in the agreement. Those measures are not subject to arbitration.

33 1613. The department may adopt regulations to implement
34 this chapter. Division 13 (commencing with Section 21000) of the
35 Public Resources Code does not apply to any regulations so
36 adopted.

37 SEC. 3. No reimbursement is required by this act pursuant to
38 Section 6 of Article XIII B of the California Constitution because
39 the only costs that may be incurred by a local agency or school
40 district will be incurred because this act creates a new crime or

1 *infraction, eliminates a crime or infraction, or changes the penalty*
2 *for a crime or infraction, within the meaning of Section 17556 of*
3 *the Government Code, or changes the definition of a crime within*
4 *the meaning of Section 6 of Article XIII B of the California*
5 *Constitution.*

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